

IN THE SUPREME COURT OF MISSOURI

ST. CHARLES COUNTY, et al.,)	
)	
Appellants,)	
)	
vs.)	Docket No. SC 86302
)	
CITY OF ST. PETERS, et al.,)	
)	
Respondents.)	

Appeal from the Eleventh Judicial Circuit Court
Honorable Lucy D. Rauch, Circuit Judge
Division No. 3

SUBSTITUTE REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
CITY OF ST. PETERS, MISSOURI

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POINT RELIED ON

VIII. The Trial Court Erred In Refusing To Assess The Attorneys' Fees Incurred By St. Peters Against The Plaintiffs In That The Declaratory Judgment Act Permits Attorneys' Fees To Be Recovered In Cases of Special Circumstances, And The Trial Court Abused Its Discretion In Failing To Find Special Circumstances Exist In This Case.

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ARGUMENT

VIII. The Trial Court Erred In Refusing To Assess The Attorneys' Fees Incurred By St. Peters Against The Plaintiffs In That The Declaratory Judgment Act Permits Attorneys' Fees To Be Recovered In Cases of Special Circumstances, And The Trial Court Abused Its Discretion In Failing To Find Special Circumstances Exist In This Case.

Argument in Reply

In their Reply Brief (“Plaintiffs’ Reply”), Plaintiffs concedes that attorneys’ fees may be awarded Defendant, the City of St. Peters, Missouri (“City”), but strenuously urge that the Trial Court did not abuse its discretion in failing to order such fees be paid to City in this case.

Both Plaintiffs and the City acknowledge Missouri’s adoption of the “American Rule” which provides that, absent statutory authorization or contractual agreement, each litigant must bear the expense of his or her own attorney’s fees. Both Plaintiffs and the City also acknowledge that exceptions to the “American Rule” permit the assessment of attorneys’ fees as costs in a declaratory judgment action.

The City bases its request for assessment of attorneys fees against Plaintiffs in this case on two recognized exceptions to the “American Rule.” First, attorneys’ fees may be assessed in favor of the prevailing party in “those cases involving ‘special circumstances.’” Second, an award of fees may be made to “balance the benefits” exception, namely in “‘very unusual circumstances’ where

necessary in equity to balance the benefits.” City of Cottleville v. St. Charles County, 91 S.W.3d 148, 150 (Mo. App. E.D. 2002); see also Strain-Japan R-16 School Dist. v. Landmark Systems, Inc., 51 S.W.3d 916, 922 (Mo. App. E.D. 2001) (same); Wall USA, Inc. v. City of Ballwin, 53 S.W.3d 168, 172-73 (Mo. App. E.D. 2001).

Plaintiffs and the City agree that attorneys’ fees *may* be awarded under the “balancing of the benefits” or “special circumstances” exceptions to the American Rule. The question on this appeal is whether the Trial Court abused its discretion in failing to award such fees as costs in this case.

A. Special Circumstances Exist.

Plaintiffs contend that no “special circumstances” exist (Appellants’ Second Substitute Brief, p. 71). There is not, however, any serious question whether special circumstances exist; rather the question for this Court is whether the existing special circumstances are sufficient to require assessment of fees in favor of the City.

Missouri courts have cited the following factors supporting “special circumstances”: deliberate conduct including “bad faith or ... wrongful purpose,” see City of Pacific v. Metro Development Corp., 922 S.W.2d 59, 66 (Mo. App. E.D. 1996) and Temple Stephens Co. v. Westenhaver, 776 S.W.2d 438, 442-43 (Mo. App. W.D. 1989); incidental benefit from the litigation to third-parties, Temple Stephens, 776 S.W.2d at 443; benefit to the public as a whole. Id. On this Appeal, additional factors were presented to the Trial Court and militate in favor

of the conclusion that this litigation presents special circumstances requiring the award of the City's attorneys' fees to it.

First, deliberate conduct showing bad faith or wrongful purpose exists. This case presents special circumstances showing bad faith because of the unnecessary delay on the part of Plaintiffs in bringing suit, because of the nature of the relief sought by Plaintiffs, because Plaintiffs represent one local government in a lawsuit seeking damages against another local government, and because of the potentially devastating consequences to the County and St. Peters which Plaintiffs sought in their suit.

1. Deliberate Conduct Showing Bad Faith Or Wrongful Purpose.

Plaintiffs waited until after substantial redevelopment progress occurred in the Redevelopment Area before bringing suit. Plaintiffs do not even contend they were unaware of the adoption of the Plan and Ordinances; rather, Plaintiffs contend no obligation existed to bring challenges to the TIF until it proved successful (that is, until revenues generated as a result of the redevelopment were captured and allocated to support of the TIF).

Their first suit was filed in August 2000—nearly *eight years after adoption of the St. Peters City Centre Redevelopment Plan*. RL. 4. Prior to institution of the suit, public pronouncements by Plaintiff Joe Ortwerth, the County Executive, stated his disappointment that the legislative changes *he desired* from the General Assembly did not occur. RL. 114. Prior to suit, the County Executive publicly states that this Court also disappoints him:

Due to a decision by the Missouri Supreme Court, St. Charles County is compelled under the questionable legal burden of state statute to break faith with our constituent taxpayers by surrendering taxes citizens paid for designated purposes so that they may be diverted for private benefit or alternative unauthorized public use.

The Missouri Supreme Court has deceitfully interpreted the TIF statute to mean that these incremental revenues are not truly county tax dollars, but were merely collected by the County from taxpayers as “payments in lieu of taxes,” which payments are due to the private development fund.

RL. 112.

The concept that legislative decisions on public policy may legitimately run counter to his personal beliefs never enters the County Executive’s thinking. The County’s Executive is quoted in one newspaper report stating, “If the only person in the state who is willing to stand up to the pilfering of the public treasury by private profiteers is Joe Ortwerth, then Joe Ortwerth is going to do it.” RL. 116.

The lawsuits in this case were initiated in bad faith and for wrongful purposes because, prior to suit, the County and its Executive acknowledge and agree that their position is counter to legislative policy enacted into law by the General Assembly. Fueled by tax dollars, the County and its Executive initiated a suit to reverse the legislative determinations and join in that suit a County municipality. The suit is motivated, at least in part (as revealed by the public

pronouncements of the County and its Executive) by the General Assembly's decision to refrain from amending the TIF Act in the manner the County and its Executive desire. RL. 114.

The mechanism employed to attack the legislative decisions of the General Assembly and this Court's prior, allegedly, "deceitful" interpretations of the General Assembly's law, is a suit against the City charging bad faith of the City's Board of Aldermen.

Further, a lack of good faith exists in the lack of careful consideration of the merits of the claims prior to bring suit. After the County's initial suit (brought suit, presumably after careful legal analysis of the issues challenged), the County dramatically amended its pleadings (three times). RL. 4. After a year of litigation, the County dismissed the original suit only to immediately re-file it (all resulting in unnecessary delay and expense imposed on the named defendant, the City). RL. 6; L. 4. The second lawsuit resulted in summary judgment on all claims against the Plaintiffs and included the Trial Court's specific conclusion that Plaintiffs' claims were time-barred—that is, that the Plaintiffs' unjustified delay

could not be excused and militated judgment against them.¹ L. 8; 1682-87.

Finally, at the same time it is instigating suits against the City, St. Charles County continues as a direct *beneficiary* of the very TIF Redevelopment it sought to unravel. The County directly benefited from the City's sponsorship of redevelopment of a blighted area within the County and directly benefited from the receipt of increased sales tax revenues resulting from that redevelopment.

§ 99.845 (50% of EATS, together with the "base year" EATS are received by the taxing district; only 50% of EATS are received by the TIF district).

Missouri's TIF Act proceeds from the principal that blighted areas provide no economic benefit to the communities in which they exist. The Act provides a mechanism to turn those blighted areas into economically viable areas, with the consequent effect that all taxing districts enjoy increased public revenues from the redevelopment. As to EATS, the County received immediate increased sales tax revenues as a result of redevelopment. § 99.845 (50% of the increased revenues resulting from St. Charles County's sales tax levies as applied to the redeveloped

¹ In their Reply to Point VI, Plaintiffs attempt to insert unsupported facts, not contained in the record on this appeal and not ever presented to the Trial Court, regarding their delay. Plaintiffs' Second Substitute Brief, p. 58. According to Plaintiffs, "Joe Ortwerth ... pressed the City for an accounting." Not a single fact exists supporting Plaintiffs' contention, raised for the first time in its Second Brief on this Appeal.

area accrue to St. Charles County). Thus, St. Charles County has already received \$1 million in increased sales tax revenues resulting from the redevelopment.

Bad faith and wrongful purposes exist in the motivation behind this suit, in the isolated targeting of one municipality over others in the County and in the lack of careful consideration of the public good sought to be achieved before bringing the suits.

In addition to bad faith, “special circumstances” exist in that the City prevailed on each and every claim brought by the Plaintiffs. The Trial Court’s decision eliminates confusion and uncertainty relating to the legality of the St. Peters City Centre Redevelopment, and adds further clarity to the operation of and constitutionality of the TIF Act. Both effects redound to the benefit of St. Peters, its residents, all St. Charles County taxpayers and to municipalities throughout the State of Missouri.

In their Reply, Plaintiffs point only to the fact that their conduct in dismissing the original 12-count petition and re-filing it does not constitute a “special circumstance.” Plaintiffs’ Second Brief, pp. 73-74. The City has never suggested that dismissal of a suit for re-filing can alone constitute “special circumstances.” Rather, the City suggests that a local governmental body’s legal dispute with another local government should be carefully evaluated before resorting to costly, time-consuming litigation. That careful consideration should include a narrowing of the issues in dispute such that, when brought, the litigation narrowly presents issues necessary for judicial intervention. Such an approach—

to be distinguished from Plaintiffs’ “shotgun” approach in this case (characterized by the initial filing of 12 counts and the subsequent repeated amendments to the pleadings)—represents the prudent administration of office expected of governmental bodies.

2. Incidental Benefit to Third Parties and Benefit To The Public As A Whole.

The City’s success in this declaratory judgment action provides incidental benefit to third parties and benefit to the public as a whole.

Plaintiff’s suit directly attacks fundamental and settled understandings about the Act and redevelopment under the Act. The declaratory judgment of the Trial Court turned-back Plaintiffs’ challenges to those understandings to benefit (and reassurance) of the General Assembly, local governments, developers, investors and the public. Plaintiffs’ suit raised issues which potentially undermine an unknown number of TIF redevelopment plans throughout the state, with the consequent potential of wreaking fiscal disaster on the sponsoring municipalities of those plans. Financial difficulties of local governments—threatened with the prospect of “refunding” millions in increment collected, pledged and applied in aid of redevelopment—would directly impact all taxing districts by impacting the ability of local governments to provide basic services and continue public support of each local government’s tax base. A direct and substantial benefit to taxpayers also results from the result achieved by the City, because the declaratory judgment

entered below protects taxpayers by protecting the local governments potentially impacted by a declaratory judgment entered in favor of Plaintiffs. .

Indeed, St. Charles County itself is among the “third-parties” benefited through the successful judgment achieved by the City. Plaintiffs pointedly contend that success on their suit portends “financial devastat[ion]” for the City. Through success on the issues raised the City saves the County from the additional financial problems it would face should one of its municipalities suffer “financial devastation.”

The defense of the suits has also benefited citizens of the County. The claims for refunds in the lawsuits potentially could cause financial difficulties for the City. The impact of financial difficulties of a municipality within the County are, thankfully, unknown; however, the benefit of avoiding such problems clearly accrues to all citizens of the County.

In summary, this case presents one of “special circumstances” permitting the award of attorneys’ fees to the City. The Trial Court abused its discretion in failing to order such fees, or any portion of said fees, to be paid. The City requests this Court reverse the Trial Court’s refusal to award fees and remand to the Trial Court for further proceedings determining the amount of fees to be assessed as costs against Plaintiffs.

B. Attorneys Fees Should Be Awarded St. Peters To “Balance the Benefits.”

Plaintiffs recognize that Missouri Courts may assess attorneys fees in order “to balance the benefits.” Feinberg v. Adolph K. Feinberg Hotel Trust, 922 S.W.2d 21, 26 (Mo. App. E.D. 1996). “The equitable balancing of the benefits is permissible only in very unusual circumstances ... interpreted to mean ‘an unusual type of case, or extremely complicated litigation wherein the legal actions taken by the parties significantly differ from other actions taken by other parties in similar situations or by others trying to achieve the same result.’” Boone Valley Farm, Inc. v. Historic Daniel Boone Home, Inc., 941 S.W.2d 720, 722 (Mo. App. E.D. 1997).

“Unusual circumstances” exist as recited above. Further, the lawsuits pursued by Plaintiffs represent an “unusual case” because of the repeated amendments to the pleadings pursued by Plaintiffs and the lengthy delay before initiation of the first suit. Moreover, this case uniquely sought the financial devastation of a municipality by a County within which the municipality is located. There exist sufficient “unusual circumstances.”

The sole point raised by Plaintiffs relating to the City’s claim for attorneys fees under the “balancing of the benefits” exception is that the City is requesting its attorneys fees be recovered from Plaintiffs, as distinguished from “non litigants.” Plaintiffs’ Reply, p. 76. In Feinberg, however, the Court affirmed the assessment of the attorneys’ fees awarded in that case against the opposing parties.

Feinberg, 922 S.W.2d at 26 (affirming the trial court’s orders for the Trust to pay fees and for the trustees-defendants “to reimburse the Trust for the payment of these fees”). Thus, the request that the Plaintiffs bear the burden of fees expenses incurred by the City in this case fits the parameters of the “balancing of the benefits.”

Moreover, non-litigants will more equitably share in the costs of this litigation should Plaintiffs be assessed fees. Among those who benefit from the successful defense of the current lawsuit are all citizens of St. Charles County. Without the assessment of fees against Plaintiffs, the City’s residents (also residents of St. Charles County) are unfairly burdened with the taxpayer cost of initiating the years-long litigation (as St. Charles County residents and taxpayers) and the defense of that same litigation (as City residents and taxpayers). All St. Charles County residents benefit from the defense of the suits because, as a result of the successful defense, the City will not suffer financial devastation. In addition, each municipality in the County benefits from the added clarity of the TIF Act and its implementation through local ordinances.

The assessment against Plaintiffs is not perfect—admittedly, municipalities throughout the State of Missouri benefit from the successful defense of Plaintiffs’ claims—but such an assessment is a more equitable apportionment of the burdens of the litigation than the failure to order such an assessment.

In summary, this case presents one of “unusual circumstances” permitting the award of attorneys’ fees to the City in order to “balance the benefits.” The

Trial Court abused its discretion in failing to order such fees to be paid. The City requests this Court reverse the Trial Court's refusal to award fees and remand to the Trial Court for further proceedings determining the amount of fees to be assessed as costs against Plaintiffs.

CONCLUSION

The Trial Court's Judgment denying the City's request for assessment of attorneys' fees should be reversed, and this cause remanded to the Trial Court for further proceedings determining the amount of attorneys' fees and costs to be assessed against Plaintiffs.

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CERTIFICATE OF ATTORNEY FOR BRIEF AND DISK SUBMITTED

The undersigned hereby certifies that the Substitute Reply Brief for Respondent/Cross-Appellant, the City of St. Peters, Missouri, complies with the limitations contained in Rule 84.06(b) and that there are 2,853 words in the brief, excluding the cover, certificate of service, signature block and appendix. A floppy disk containing a copy of the Substitute Brief of Respondent/Cross-Appellant, the City of St. Peters, Missouri is attached and I hereby certify that said floppy disk has been scanned for viruses and is virus-free.

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The undersigned hereby certifies that two true and correct copies of the foregoing were served on the _____ day of January 2005, by _____ United States mail, postage prepaid;
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